

IN THE LABOUR COURT OF SOUTH AFRICA, JOHANNESBURG

Reportable

Case no: JR1834/17

In the matter between:

PAMELA NOMAWETHU NJIKELANA

Applicant

and

WERNER KRUGER, N.O

First Respondent

COMMISSION FOR CONCILIATION

MEDIATION AND ARBITRATION

Second Respondent

SOUTH AFRICAN CIVIL AVIATION AUTHORITY

Third Respondent

Heard: 18 April 2019

Delivered: 07 May 2019

JUDGMENT

MAHOSI.J

Introduction

- [1] This is an application in terms of section 145 of the Labour Relations Act (LRA)¹ to review and set aside the arbitration award issued by the first respondent (the commissioner), under the auspices of the second respondent, the Commission for Conciliation, Mediation and Arbitration (the CCMA), dated 15 July 2017 under case number GATW 5386-17.
- [2] Prior to outlining the applicant's case in detail and considering the issues that gave rise to the dispute, it is necessary to outline the facts that form the relevant background to the dispute between the parties.

Material background facts

- [3] The applicant was employed by the third respondent as Human Resources: Generalist on a fixed term contract from 1 August 2015 for a period of 12 months. The termination date was 31 July 2016. It was renewed for two consecutive periods, The first, from 1 August 2016 to 31 December 2016 and secondly from 1 January 2017 to 31 March 2017.
- [4] It is common cause that prior to an employee joining the third respondent, he/she is required to undergo various verification exercises such as credit, qualification and criminal checks which are performed by the third respondent's Forensic Department. Prior to joining the third respondent, the applicant was also subjected to these verification exercises.
- [5] On or about July 2016, the third respondent commissioned a service provider, Lexis Nexis, to conduct another verification exercises on the applicant, which established that the applicant had a criminal record. On 10 October 2016, the applicant was invited to a meeting by the Internal Audit unit during which she was requested to complete a Forensic Interview Information Sheet. The applicant completed the form and indicated that she had no past, current or pending criminal record against her name.

¹ Act 66 of 1995 as amended.

- [6] Subsequently, the applicant was informed that she was under investigation owing to the fact that the Lexis Nexis report disclosed that there was a criminal record against her name. The applicant denied knowledge of any criminal record against her name. It was then agreed that the applicant would enquire about the status of her criminal record.
- [7] On 11 October 2016, the applicant approached the Pretoria Criminal Record Centre where it was confirmed that she indeed had a criminal record that arose from an incident in 1990 when she was arrested and fined R150.00 for stealing sweets, chocolate and biltong. The applicant then approached the Department of Justice to apply for the expungement of her criminal record.
- [8] On or about 8 February 2017, the third respondent advertised two positions and the applicant applied for a permanent position of Human Resources, Business Partner. On 13 March 2017, the applicant was interviewed for the position she applied for and was requested to complete a declaration form in respect of which she disclosed her criminal record. The applicant further deposed to an affidavit on 23 March 2017 confirming her criminal record, which was submitted to the respondent on 27 March 2017.
- [9] A meeting was held between the applicant and the third respondent's representatives on 30 March 2017 in which the applicant was informed that her application for the permanent position was unsuccessful and that her fixed term contract would not be renewed. On 31 March 2017, the third respondent issued two letters to the applicant confirming her non-appointment and non-renewal of her fixed term contract.
- [10] Aggrieved by the third respondent's decision not to renew her fixed term contract and not to appoint her, the applicant referred an unfair dismissal dispute to the CCMA in terms of section 186(1)(b) of the LRA. The dispute could not be resolved at conciliation and as a result, a certificate of non-resolution was issued. The dispute was arbitrated on 12 July 2017. On 15 July 2017, the commissioner

issued an award in terms of which he dismissed the applicant's claim. It is this award that is the subject of this application.

The Arbitration Award

[11] The issue before the commissioner appears in the parties' pre-arbitration minute as follows:

6.1 Whether the respondent dismissed the applicant?

6.1.1 The respondent submits that the contract simply expired on termination date of 31 March 2017.

6.1.2 The applicant submits that the respondent dismissed her.

6.2 Whether the applicant had a reasonable expectation of renewal or appointment into a permanent position?

6.3 If the CCMA finds that there was a dismissal, then whether the dismissal was procedurally and substantively unfair.²

[12] In his award, the commissioner recorded the issue in dispute as whether the applicant had a reasonable expectation that her fixed-term contract would be renewed or extended as provided for under section 186(1)(b) of the LRA.

[13] In his analysis, the commissioner made a finding that the applicant did not meet the requirements of section 186(1)(b) of the LRA. The basis for his finding was that the applicant was appointed in a temporary position and that this position no longer existed. Further that the applicant was not asking for her fixed term contract to be renewed on the same terms and conditions, but that she be appointed to a new position.

[14] On the issue of dishonesty, regarding the applicant's criminal record, the commissioner rejected the applicant's submission that during her interview, she

² Index 2 (Notices and CCMA Bundle) at page 173.

had forgotten that she had a criminal record. This appears on paragraph 22 of his award where he stated as follows:

'It is highly improbable that the applicant did not remember during the interview that she was arrested. In all likelihood this would have been a traumatic experience and it is difficult to see how she could forget it. Furthermore, she kept quiet and only informed the respondent of the incident on 23 March some five months after the first interview.'

[15] The commissioner further found that the applicant failed to prove that, despite the fact that she did not disclose her criminal record, she had a reasonable expectation for the renewal of her fixed term contract or permanent appointment. As a result, the commissioner dismissed the applicant's claim.

[16] Dissatisfied with the arbitrator's award, the applicant brought this application.

The Grounds for Review

[17] The applicant seeks to review the award on the basis that the commissioner failed to consider the evidence that the applicant's expectation was reasonable and therefore arrived at an award that no reasonable decision-maker could have arrived at.

The applicable law and analysis

[18] The issue before the commissioner was whether the applicant was dismissed. Dismissal is defined in Section 186(1)(b) of the LRA as:

(1) Dismissal means that-

- (a) an employer has terminated employment with or without notice;
- (b) an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms, or did not renew it.'

[19] In *SA Rugby Players' Association v SA Rugby (Pty) Ltd and Others; SA Rugby (Pty) Ltd v SARPU (SARPU)*,³ the Labour Appeal Court (LAC) dealt with a similar matter and stated as follows:

'39. The issue that was before the commissioner was whether there had been a dismissal or not. It is an issue that goes to the jurisdiction of the CCMA. The significance of establishing whether there was dismissal or not is to determine whether the CCMA had jurisdiction to entertain the dispute. It follows that if there was no dismissal, then the CCMA had no jurisdiction to entertain the dispute in terms of section 91 of the Act.

...

[41] The question before the Court *a quo* was whether on the facts of the case a dismissal had taken place. The question was not whether the finding of the commissioner that there had been a dismissal of the three players was justifiable, rational or reasonable. The issue was simply whether objectively speaking, the facts which would give the CCMA jurisdiction to entertain the dispute existed. If such facts did not exist the CCMA had no jurisdiction irrespective of its finding to the contrary.

...

[43] What s 186(1)(b) provides for is that there would be a dismissal in circumstances where an employee reasonably expected the employer to renew a fixed term contract of employment on the same or similar terms but the employer only offered to renew it on less favourable terms or did not renew it. The operative terms in s 186(1)(b) are in my view, that the employee should have a reasonable expectation, and the employer fails to renew a fixed term contract or renew it on less favourable terms. The fixed term contract should also be capable of renewal.

³ [2008] 9 BLLR 845 (LAC) at para 41.

[44] The appellants carried the onus to establish that they had a 'reasonable expectation' that their contracts were to be renewed. They had to place facts which, objectively considered established a reasonable expectation. Because the test is objective, the enquiry is whether would a reasonable employee in the circumstances prevailing at the time have expected the employer to renew his or her fixed term contract on the same or similar terms. As soon as the other requirements of s186(1)(b) have been satisfied it would then be found that the players had been dismissed, and the respondent (SA Rugby) would have to establish that the dismissal was both procedurally and substantively fair.'

[20] The applicable test is, therefore, that of "correctness" as opposed to "reasonableness." The correctness of the commissioner's decision has to be determined from the objective facts that were properly before him. This was confirmed by the Labour Appeal Court (LAC) in *Enforce Security Group v Mwelase Fikile and Others*⁴ where it stated as follows:

'The question whether there has been a dismissal goes to the jurisdiction of the CCMA and the Labour Court to entertain the parties' dispute. A finding that there was no dismissal means that the CCMA and subsequently the Labour Court did not have jurisdiction to entertain the dispute. Such a finding as a matter of fact, has to be a correct finding. It cannot be a finding that falls within a band of reasonable findings since there can only be one correct finding. To the extent that the court a quo found that the award stands to be reviewed and set aside as a decision which no reasonable decision maker could have reached it misdirected itself because it applied a wrong test to review the award of the commissioner.'

[21] As aforementioned, the applicant's contention was not only that she had a reasonable expectation that her fixed-term contract would be renewed but also that she would be appointed permanently. To support her contention, the applicant relied on the evidence that her fixed term contract had been renewed twice before, that the third respondent conceded that, but for the alleged

⁴ (2017) 38 ILJ 1041 (LAC); [2017] 8 BLLR 745 (LAC) at para 16.

dishonesty, she would have been appointed and further that her criminal record was expunged on 15 March 2017.

[22] The applicant's argument that she harboured a reasonable expectation to be appointed on a permanent position is equally not sustainable. In *University of Pretoria v Commission for Conciliation Mediation and Arbitration and Others*,⁵ the following was said;

[18] The words employed in s186 envisage that two requirements must be met in order for an employer's action to constitute a dismissal:

- (1) a reasonable expectation on the part of the employee that a fixed term contract on the same or similar terms will be renewed; and
- (2) a failure by the employer to renew the contract on the same terms or a failure to renew it at all.

These words do not however carry the meaning which is urged by third respondent, namely that, by being employed on the basis of a series of fixed terms contracts, an employee has without more a reasonable expectation of a permanent appointment. The distinction between the fixed term contract and a permanent contract has a clear economic rationale. An employer in the position of the appellant may have discretionary funds for a limited period. During this period, it offers a series of fixed term contracts to a particular employee. At some point these funds are depleted and the employer can no longer afford a further fixed term contract. By contrast, the creation of a permanent post would necessitate a more permanent source of funding.

[19] Although a draft Bill has no significant interpretative weight, it is instructive to refer to the Labour Relations Amendment Bill of 2010 in which the following amendment was proposed to s186:

"Section 186 of the principal Act is amended by-

⁵ [2012] 2 BLLR 164 (LAC).

(b) an employee engaged under a fixed term contract of employment reasonably expected the employer –

(i) to renew a fixed term contract of employment on the same or similar terms but the employer offered to renew it on less favorable terms, or did not renew it; or

(ii) to offer the employee an indefinite contract of employment on the same or similar terms but the employer offered it on less favorable terms, or did not offer it, where there was reasonable expectation.”

The draft therefore makes a clear distinction between an expectation to renew a fixed term contract and the offer of an indefinite contract of employment.

[20] The facts of this case illustrate this distinction. Third respondent enjoyed seven fixed term contracts prior to her application for a permanent position. In this case, she chose ‘to put her hat in the ring’ for a permanent appointment. In other words, her own conduct illustrates the distinction between the expectation of the renewal of a fixed term contract and another form of contract, in this case a permanent post. Had she not been offered a further fixed term contract, then depending on the evidence, she could be entitled to proceed in terms of s186(1)(b). That would, however, not be a case based, as is this one, on a different form of employment, being a permanent contract.

[21] The words chosen by the legislature, absent an amendment to the legislation, cannot carry the burden of the third respondent’s case in that it covers a restrictive set of circumstances, namely a reasonable expectation of a renewal of that which had previously governed the employment relationship, namely a fixed term contract which had previously been enjoyed, which had now expired and, by virtue of the factual matrix created, at best, a reasonable expectation of a renewal.’

[23] In view of the above authority, the applicant’s reliance on section 186(1)(b) of the LRA to claim her non-appointment to a permanent position is misplaced. Section 186(1)(b) of the LRA covers instances where the employee alleges a reasonable expectation of renewal of a fixed term contract that has expired. It does not cover reasonable expectation of appointment in a permanent position subsequent to

several renewals of a fixed term contract. Therefore, the applicant's claim that her non-appointment on a permanent basis amounted to dismissal as envisaged in section 186(1)(b) of the LRA is meritless.

- [24] The next question is whether on the facts that were placed before the commissioner, the applicant established that she held a reasonable expectation that her contract would be renewed. In *Independent Municipal And Allied Trade Union and Another v City of Johannesburg Metropolitan Municipality and Others*⁶

'When assessing whether an expectation is reasonable all the surrounding facts and circumstances should be considered including the terms of the contract of employment, promises made by the employer – regardless of contractual terms which gainsay what the employer promised and the general conduct of the parties.'

- [25] There was no evidence whatsoever, before the commissioner and before this Court, that there was an expectation created by the third respondent that the applicant's contract of employment would be renewed. The applicant's case was that, in finding that she failed to prove her legitimate expectation, the commissioner did not consider the circumstances that gave rise to her expectation. In making her case, the applicant's relied on the fact that while still employed, there were no performance issues, she committed no misconduct and the third respondent renewed her contract because they were happy with her. Regrettably, the circumstances relied on by the applicant do not establish that the third respondent created an expectation that her contract would be renewed.

- [26] The applicant's strong reliance on the fact that the incident she was arrested for occurred 26 years ago is also not helpful to her case because it is apparent from the evidence that after having being made aware of the criminal record, she did not immediately confirm the existence thereof with the third respondent. Instead, the applicant sought to apply for the expungement of the criminal record and gave the third respondent an impression that there had been a mistake that she

⁶ [2014] 6 BLLR 545 (LAC) at para 34.

was in a process of rectifying it. It was only after five months or so and after being requested to depose to an affidavit that she confirmed that she indeed had a criminal record. So, even if she had forgotten about her criminal record, she was afforded an opportunity to set the record straight, but she failed. The third respondent gave evidence on its Code of Ethics, which requires honesty and integrity from all its employees.

[27] As such, in failing to “come clean” and to admit that there was a criminal record against her name, the applicant was dishonest. On the face of such dishonesty, the applicant could not have harboured an objectively reasonable expectation of the renewal of her fixed term contract or permanent appointment.

[28] The commissioner correctly found on the evidence before him that it was difficult to comprehend how it could be expected of the third respondent to renew or appoint the applicant given that she did not only fail to disclose her criminal record, but also denied its existence. For that reason, he found that the requirements of section 186(1)(b) of the LRA had not been satisfied in that the applicant failed to establish that she had a reasonable expectation of renewal. It was on the basis of his finding that he dismissed the applicant’s claim.

[29] It is my view that the commissioner’s finding was correct. There is consequently no reason for this Court to interfere with his ruling. The application to review and set aside the arbitration award in the circumstances falls to be dismissed.

[30] I have had regard to the issue of costs and I find that taking into account the requirements of law and equity, there should be no order as to costs.

[31] In the circumstances, I make the following order.

Order

1. The application to review and set aside the arbitration award issued by the first respondent under the auspices of the second respondent dated 15 July 2017 under case number GATW 5386-17 is dismissed.

2. There is no order as to costs.

D. Mahosi

Judge of the Labour Court of South Africa

Appearances:

For the applicant:

Advocate B Ford

Instructed by

Nkuna and Mabunda Inc. Attorneys

For the third respondent:

Ms D Norton of Mkhabela Huntly Attorneys